STATE OF MICHIGAN

COURT OF APPEALS

JOEL SUPER and MADELEINE SUPER as Next Friend of KATERINA SUPER, a Minor,

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant,

and

MELISSA KAE KANE,

Defendant.

UNPUBLISHED
July 14, 2009

No. 282636
Court of Claims
LC No. 07-000085-MZ

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent because I am not convinced that the result reached by the majority is absolutely mandated by the present state of the law, and furthermore, important policy considerations warrant the opposite result.

This case arises out of injuries sustained by Katerina Super as a result of an automobile accident. Katerina was three years old at the time. Katrina and her siblings were riding in child seats, properly restrained in the back seat of their parents' vehicle. The family was driving eastbound on I-94 in Calhoun County, near the Battle Creek rest area. At the same time, Melissa Kae Kane, an employee of the Department of Transportation (MDOT), was driving a white Department van westbound at – according to an accident reconstructionist – 92.3 MPH, apparently because she was running late. Witnesses who were also driving westbound testified that the van "flew" past them, lost control, and began rolling over. The van literally became airborne, crossed over the median, and, despite Super's father's attempts to avoid a collision, struck the Supers' car on the driver's side. The worst damage was just behind the driver's door; the passenger window on that side shattered, and the glass fragments lacerated Katrina's scalp and face. MDOT itself was fully aware of these events: three weeks after the accident, it issued a "Notice of Formal Counseling" to Kane, identifying the accident, the location, and even the police report that estimated her speed at 92 MPH. Notwithstanding these facts, and notwithstanding the lack of any legal authority mandating such a result, the majority feels

constrained to hold that MDOT is immune to the instant suit because it did not receive procedurally correct technical notice. I do not.

As the majority observes, statutes of limitations are distinct from notice provisions. Both, however, are generally regarded under Michigan law as procedural, rather than substantive. *Staff v Johnson*, 242 Mich App 521, 531; 619 NW2d 57 (2000).

Statutes of limitations are generally intended to protect would-be defendants from defending against stale claims and to punish would-be plaintiffs who fail to pursue their claims industriously. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 404 n 22; 738 NW2d 664 (2007). Early in Michigan's legal history, the power of the Legislature to enact limitations periods was "not doubted," although unless "a reasonable time within which suit may be brought" was afforded, any such statute could not be "sustained as a law of limitations." *Price v Hopkin*, 13 Mich 318, 324-325 (1865). The goal, then, is to cut off liability at some point simply by virtue of the passage of time.

Notice provisions, at least in the context of suits against public entities, are intended to protect the taxpayers from "unjust raids upon [public] treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and the accident within reach." *Ridgeway v City of Escanaba*, 154 Mich 68, 72-73; 117 NW 550 (1908). Notice provisions are additionally intended to afford government entities the opportunity to conduct a timely investigation, particularly because the individuals who would need to conduct that investigation might not have any other way to learn of the potential liability in advance of commencement of an actual suit. See the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32, 42-44; 199 NW2d 188 (1972).

Finally, the "purpose of a savings or tolling statute for persons under a disability is to protect the legal rights of those who are unable to assert their own rights and to mitigate the difficulties of preparing and maintaining a civil suit while the plaintiff is under a disability." *Klida v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008), quoting 51 Am Jur 2d, Limitation of Actions, § 218, p 591. The disability here is critical: minors are unable to protect their own legal rights by themselves, and unless the minority tolling provision actually protects those rights until the minor can purse them on his or her own, the provision fails in the essential purpose for which it was intended. See *Kilda*, pp 71-73. This does necessarily work some hardship to defendants, although any delay will likely interfere with a plaintiff's ability to put on proofs, as well. *Id*., 73.

Even though MCL 600.5851(1) only *explicitly* makes a reference to bringing an action "although the period of limitations has run," the entire provision would be nullified if it did not also apply to notice provisions. The harm that the statute is intended to rectify – the inability of certain disabled individuals to protect their own legal rights – turns on *affording those individuals a reasonable chance to protect those rights when the disability is removed*. This is not only a statutory protection, but "an important and longstanding public policy that is clearly rooted in the law." *Kilda*, *supra* at 73 (internal quotations omitted). Although *Kilda* discussed the applicability of the statute to different causes of action, its conclusion applies equally to any procedural impediment to a disabled person's ability to be made whole: "[t]o deny minors

whose cause of action accrues during their disability the opportunity to pursue their otherwise unasserted legal rights would be the antithesis of the firmly-rooted public policy that such minors are to be protected until one year after they reach the age of majority." *Id.*, *supra* at 74-75.

I agree that the Legislature has the power to structure governmental immunity exceptions as it sees appropriate, but I do not believe that the Legislature has done so in a way that removes the long-standing legal protections for disabled persons who cannot assert their own rights. In my view, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), is not disposative: it held that the Legislature could Constitutionally condition rights of action in contravention of governmental immunity on rational notice provisions irrespective of whether any prejudice would occur without that notice. *Rowland*, *supra* at 210-214. But this case is not about whether the lack of notice is prejudicial. This case is about whether a person who *has* a right but is unable to assert it because of a disability may, once the disability is removed, then have a chance to assert that right.

In short, the purpose of the minority/insanity tolling provision is to protect disabled persons from the consequences of being unable to exercise their rights on their own. It is a tradeoff, but a tradeoff that is deeply entrenched in our jurisprudence. The ultimate goal – permitting disabled persons the opportunity to bring suit – would not be served by extending one deadline until the disability is removed, but not extending another. Furthermore, this is not a case in which the claim can be said to be trumped up, nor one in which the State did not already know about the occurrence or have the superior capacity to investigate it in the first place. I have not found any cases that necessarily require the result reached by the majority, and I would not do so now.

I would affirm.

/s/ Alton T. Davis